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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 158

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. DONALD A. J. RAY, PETITIONER,

vs.

WALTER B. MARTIN, AS WARDEN OF ATTICA STATE PRISON, ATTICA, NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF WYOMING COUNTY, STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JUNE 23, 1945.

CERTIORARI GRANTED OCTOBER 8, 1945.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, DONALD A. J. RAY, Relator-Appellant,

against

WALTER B. MARTIN, as Warden of Attica State Prison, Attica, New York, Respondent-Respondent

STATEMENT UNDER RULE 234

This proceeding was commenced by the service of a writ of habeas corpus on respondent. It was commenced after decisions had been rendered by the United States District Court for the Western District of New York and the United States Circuit Court of Appeals for the 2nd Circuit, both of which courts rendered opinions in connection with their decisions and both of which opinions are included in this record. The writ was issued by the Honorable Parton Swift, Supreme Court Judge of Erie County, on the 10th day of February, 1944, and required the warden to produce the body of Donald A. J. Ray, the relator, before the Honorable Barber B. Conable, County Judge of the County of Wyoming, at a term of County Court to be held in Warsaw, New York, on the 21st day of February 1944, at 2 o'clock in the afternoon. A return was made by the Warden and the matter was argued before the said Honorable Barber B. Conable, Wyoming County Judge, on the date and at the time heretofore mentioned. Subsequent [fol. 2] thereto and on the 11th day of April, the Honorable Barber B. Conable denied the writ and filed an opinion. Thereafter and on the 22nd day of April, 1944, an order was signed and filed in the office of the clerk of the County of Wyoming and a copy of the said order with notice of entry was duly served upon the attorney for the relator. A notice of appeal was duly filed in the office of the clerk of the County of Wyoming and on the 25th day of April, 1944, a copy of said notice of appeal was duly served upon the attorney for respondent.

Following argument on the Appeal to the Appellate Division, the Supreme Court, Fourth Department, on the 27th

day of September, 1944, unanimously affirmed, with opinion, the order of the County Judge of the County of Wyoming. Pursuant to the order of the Appellate Division, the order and judgment of affirmance were entered in the Office of the Clerk of the County of Wyoming on the 13th day of October, 1944.

On the 1st day of November, 1944, the Appellate Division denied a motion for reargument or leave to appeal to the Court of Appeals. Following this, a motion for leave to appeal to the Court of Appeals was made and on the 30th day of November, 1944, an order was granted by the Court of Appeals allowing the appeal. Pursuant to that order, Notices of Appeal were duly served upon the attorneys for respondent-respondent on the 7th and 8th days of December, 1944, and a duplicate of the said Notice of Appeal was duly filed in the office of the Clerk of the County of Wyoming on the 9th day of December, 1944.

There has been no change of attorneys or parties.

[fol. 3] In County Court of Wyoming County, State of New York

The People of the State of New York, *ex rel.*, Donald A. J. Ray, Relator,

against

Walter B. Martin, as Warden of Attica State Prison, Attica, New York, Respondent

Notice of Appeal

Sirs:

Please Take Notice that the petitioner above-named hereby appeals to the Appellate Division of the Supreme Court, Fourth Department from the order entered in the office of the clerk of the County of Wyoming on the 22nd day of April, 1944, in favor of respondents and against the petitioner, wherein petitioner was denied a writ of habeas corpus.

Dated: Buffalo, New York, April ——, 1944.

Yours, etc., Thomas J. McKenna, Attorney for Petitioner, Office & P. O. Address, 705 Morgan Building, Buffalo, New York.

[fol. 4] To: Nathaniel L. Goldstein, Attorney-General, Wortley B. Paul and Henry S. Manley, Assistant Attorneys-General, appearing for the State of New York and the Warden of Attica State Prison, State Office Building, Albany, New York. Beverly S. Galloway, Esq., Assistant District Attorney of Cattaraugus County, Office & P. O. Address, 514 Exchange National Bank, Olean, New York.

WRIT OF HABEAS CORPUS

THE PEOPLE OF THE STATE OF NEW YORK,

To Dr. Walter Martin, Warden of Attica State Prison:

We Command You, That you have the body of Donald A. J. Ray by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Donald A. J. Ray is called or charged, before the Hon. Barber B. Conable, County Judge of the County of Wyoming at the courthouse, Warsaw, New York on the 21st day of February 1944, at 2 o'clock in the afternoon of that day to do and receive [fol. 5] what shall then and there be considered concerning the said Donald A. J. Ray and have you then and there this writ.

Witness: Hon. Parton Swift one of the judges of the Supreme Court of Erie County, the 10th day of February One thousand nine hundred and forty-four.

(Seal of County Clerk affixed to original.)

Harry C. Vackel, Clerk.

Thomas J. McKenna, Petitioner's Attorney, 705 Morgan Bldg., Buffalo, N. Y.

IN SUPREME COURT OF NEW YORK, ERIE COUNTY

PEOPLE OF THE STATE OF NEW YORK, ex Rel., DONALD A. J. RAY, Petitioner,

against

DR. WALTER MARTIN, Warden of Attica State Prison, Respondent

PETITION

To: Hon. Parton Swift, Justice of the Supreme Court.

The petition of Thomas J. McKenna, Attorney, herein respectfully shows to this Court:

[fol. 6] First: That Donald A. J. Ray, the person in whose behalf the writ is applied for, is now imprisoned and restrained in his liberty. That said prisoner is now confined in the State Prison at Attica, New York, in the County of Wyoming, State of New York, and that the officer or person by whom he is so imprisoned and restrained is as follows: Dr. Walter Martin, Warden of Attica State Prison.

Second: That he has not been committed, and is not detained by virtue of any judgment, decree, final order, process or mandate issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court.

Third: That prisoner was indicted by the Grand Jury of Cattaraugus County on the 20th day of September, 1939, for the crime of murder in the first degree, alleged to have been committed on the 16th day of September, 1939, in the City of Salamanca in said County. That prisoner is a citizen of the United States and not an Indian.

Fourth: That the first count charged him with intentional killing with premeditation and deliberation.

Fifth: That the second count charged the defendant with so-called felony murder, it being alleged that the killing of decedent took place while the prisoner was engaged in the commission of robbery.

[fol. 7] Sixth: That he was brought to trial under said indictment in Supreme Court at Little Valley on the 4th day of December, 1939.

Seventh: That at the close of the evidence at that trial, the Court granted the prisoner's motion to dismiss the first charge and submitted the case to the jury on the second charge alone.

Eighth: That the verdict was returned on the 11th day of December, 1939, and the prisoner having been found guilty by a Supreme Court Jury on the charge of Murder, first degree, was sentenced on December 15, 1939, to be confined in Attica State Prison for the term of his natural life.

Ninth: That the prisoner is now confined in said Attica State Prison for the term of his natural life under a commitment of the Supreme Court of Cattaraugus County.

Tenth: That said commitment at Attica State Prison and detention therein is illegal and contrary to Statute and the Constitution of the United States.

Eleventh: That the *locus in quo* is within an Indian Reservation governed by Treaties and Federal Statutes and the State of New York cannot extend its laws into said place in the absence of Treaties or Federal Statutes permitting same.

Twelfth: That there is no treaty or federal statute which permits the State of New York to extend its laws into the place in question and, particularly, for the crime of murder, first degree.

[fol. 8] Thirteenth: That the Supreme Court of the State of New York has erroneously and illegally assumed jurisdiction of the offense and has erroneously and illegally and contrary to the Statutes of the United States and the Constitution of the United States, issued a commitment under which the defendant is now incarcerated at the State Prison at Attica, New York.

Fourteenth: That Paul N. Balsiger, the deceased whom the prisoner was convicted of murdering, was a white man and not an Indian.

Fifteenth: That the place where the crime was committed was within the City of Salamanca and located within the Allegany Indian Reservation.

Sixteenth: That an appeal was taken to the Appellate Division of the Supreme Court, Fourth Department, where the conviction was affirmed.

Seventeenth: That leave to appeal to the Court of Appeals was denied.

Eighteenth: That the jurisdiction of the Supreme Court of the State of New York to try the prisoner was not challenged during the trial or on appeal.

Nineteenth: That no previous application has been made for a writ of habeas corpus in this case except an application for an order for a writ which was made to the United States District Court for the Western District of New York and which order was denied by the United States [fol. 9] District Court Judge under an opinion signed in said case on July 12, 1943, and filed on July 19, 1943. That annexed hereto and marked Exhibit "A" is a copy of that opinion. An appeal was taken from an order entered in the United States District Court on that opinion to the United States Circuit Court of Appeals for the Second Circuit and the judgment of the District Court, denying the order, was affirmed, as more fully appears by an opinion of the said United States Circuit Court of Appeals for the Second Circuit, which is hereto annexed and marked Exhibit "B."

Twentieth: That the prisoner be produced in court on the return day of the writ in civilian clothes.

Wherefore, petitioner asks this court to issue a writ of habeas corpus so that the jurisdictional question urged in this case be decided and the rights in the case become authoritatively settled on the hearing of such writ.

Thomas J. McKenna, Petitioner.

Dated: Buffalo, N. Y., February 9, 1944.

(Verified by Thomas J. McKenna, February 9, 1944.)

[fol. 10] EXHIBIT "A" TO PETITION

OPINION

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Misc. Civil

In the Matter of

The Application of DONALD A. J. RAY, Petitioner, for the issuance of a Writ of Habeas Corpus

Appearances: Thomas J. McKenna; for Petitioner; Beverly S. Galloway; Assistant Dist. Atty.; for County of Cattaraugus; Nathaniel L. Goldstein; Attorney General; Wortley B. Paul; Henry S. Manley; Assistant Attorneys General of Counsel; for the State of N. Y.; George L. Grobe, U. S. Attorney; for U. S.

KNIGHT, District Judge:

Petitioner, a white man, on December 4, 1939, in the Supreme Court, Cattaraugus County, New York, was convicted and sentenced to life imprisonment for murder of a white man, in the City of Salamanca, Cattaraugus County, New York. The locus of the murder lies within the Allegany Indian Reservation; all the lands within the City of [fol. 11] Salamanca being leased from the Seneca Nation of Indians. The conviction aforesaid was affirmed in the Appellate Division of the Supreme Court of New York and leave to appeal to the Court of Appeals of that state denied. In none of the proceedings has the question of jurisdiction been raised until the present. Petitioner, applying for writ of habeas corpus, contends the courts of New York State have no jurisdiction of the offense charged within the City of Salamanca. The county and state, with the United States concurring, seek a denial of the writ on several grounds. It is asserted that the application here is prematurely made, because the petitioner has not exhausted his remedies in the state court. It does appear that no application for writ has been made in the state courts. It has repeatedly been held that one must avail himself of the remedies in the state courts before he can seek relief through habeas corpus in this court. The rule

is distinctly stated in Jones v. Dowd, 128 F. (2d) 331, 334, wherein the court said:

> "A litigant in a State court is not at liberty to set in motion the jurisdiction of the Federal court by a petition for a writ of habeas corpus charging the State court has denied him due process under the Fourteenth Amendment, until the State has been given a chance to make its record under this same writ. The orderly administration of justice demands it."

To the same effect, see also: Mooney v. Holshan, 294 U. S. 103, 115, Stonefield v. Buchanan, 124 F. (2d) 23.

[fol. 12] There is a further rule relating to the writ of habeas corpus in situations such as presented herein. It is distinctly stated in U. S. *ex rel.* Lesser v. Hunt, 117 F. (2d) 30, 31, which arose in this District, as follows:

> "As we have several times said, intervention by lower federal courts in such cases is justified only in the rarest instances; that is, only when the state courts will not, or cannot, do justice, * * * his remedy, if he had any, was only by application to the Supreme Court of the United States by certiorari."

The rule of comity requiring further proceedings to be taken before the United States Supreme Court, where a prisoner has been convicted in state courts and pursued his remedies of appeal therein, is also followed in other Circuits. See Johnson v. Wilson, 131 F. (2d) 1; Kramer v. Nevada, 112 F. (2d) 417; Jones v. Dowd, 128 F. (2d) 331; U. S. *ex rel.* Parker v. Carey, 135 F. (2d) 205.

Petitioner contends that exceptional circumstances are presented herein which should lead the court to exercise its discretion to issue the writ, citing in support thereof Bowen v. Johnson, 306 U. S. 19. An inspection of that case does not reveal any question of conflicting review by a federal court of a state court system, and I do not believe the language of the opinion should be so extended. It seems to me that any discretion in the court should be exercised in favor of the state. U. S. *ex rel.* Parker v. Carey, *supra.*

[fol. 13] In view of the foregoing I am of the opinion that the petition is insufficient in law and that the petitioner has chosen the wrong forum for relief, if he is entitled to any.

If I am in error in the above conclusion, it seems to me that the motion must be denied for another reason.

Originally New York and Massachusetts claimed sovereignty over the land in question, each under a crown grant from England. The dispute was settled in 1786 with Massachusetts ceding sovereignty to New York. The United States Constitution was adopted in 1787 taking away the power of the states of negotiating treaties in the constitutional sense and in due course of time treaties with the Indians required the concurrence and approval of the national government. In 1871 by Act of March 3, 1871, (Sec. 2079 Rev. Stat.) the course of dealing with the Indians by treaty was abolished and in place therefor was substituted congressional action.

Under the Constitution there is no literal phrasing giving Congress the power of sovereignty in derogation of state sovereignty over the Indians. However, this has always been an implied power, and the Indian has been referred to as the ward of the nation, U. S. v. Kagama, 118 U. S. 375, U. S. v. National Gypsum Co., 40 F. Supp. 206, 210, and this power has extended to cover both the Indian and the reservation. Under the Constitution it is thus evident that the states have lost exclusive sovereignty over the [fol. 14] Indians, and the question is presented to this court whether or not New York State has been relieved of its sovereignty in this case, the answer depending upon whether or not Congress has evinced any intent in the premises. If Congress has legislated to prescribe exclusive federal jurisdiction over the crime involved herein, the state law must bow thereto. U. S. v. National Gypsum Co., *supra;* U. S. v. Forness, 125 F. (2d) 928, 932.

Petitioner contends that Section 217 U. S. C. A., Title 25, extends the general laws of the United States to the Allegany Reservation and as a corollary thereto extends U. S. C., Title 18, Sec. 451, sub. sec. 3 and sec. 452, the former prescribing exclusive jurisdiction in the United States over crimes defined in the Chapter which includes the latter, or Section 452, defining murder and which includes the acts involved herein—homicide in the perpetration of a robbery. The crux of petitioner's contention lies in the interpretation of Section 217, Title 25 U. S. C. The language of that section is as follows:

> "Except as to crimes the punishment of which is expressly provided for in this title, the general laws

of the United States as to the punishment of any crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country."

Does the language above quoted "Indian Country" include the City of Salamanca? An examination of Title [fol. 15] 25, Chapt. 6, Secs. 211 and 266 shows that the phrase "Indian Country" is used therein unnumberable times. Although ordinarily it would be presumed that the meaning of this phrase would be the same in each instance, this construction would yield if an inspection shows that different meanings were intended in the various uses. Section 219 prescribes requirements for the "Indian Country"; Section 220 authorizes passport requirements for the "Indian Country"; Section 220 authorizes removal of certain persons from the "Indian Country"; while Section 222 authorizes removal from "any tribal reservation"; Section 242 specifically defines Osage County, Oklahoma, as "Indian Country", but only within statutes prescribing the sale of intoxicants. Section 1 of the Act of 1834 defines "Indian Country" as land west of the Mississippi with certain exceptions. From the foregoing it is evident that the term "Indian Country" has been used in various meanings by Congress, and it is necessary to examine the particular section and circumstances to determine the meaning intended.

It is said that the term "Indian Country" embraces all land within the United States to which the Indian title has never been extinguished. *Ex parte* Crow Dog; 109 U. S. 556. In U. S. v. Leathers, 26 F. Cas. 16, 581, pp. 897, 899, it is stated:

> "From the earliest period of our history the boundaries of the Indian country have been narrowing. • • • The policy has been to separate the Indian tribes from [fol. 16] the rest of the people, and to set apart for their exclusive use specific portions of the public domain. The statutes cited show that 'Indian Country' is the term used generally to describe country in the occupation of the Indians, to which their title or right of occupancy • • • has not been extinguished. • • •".

No cases are cited by or on behalf of petitioner which apply Section 217, Title 25, and Section 542, Title 18, to a similar set of facts as are herein presented.

Objectively it appears that there are six to eight Indian families residing in the City of Salamanca having a total population of about 9,000. During the last 40 years several murder cases have been prosecuted to conviction in the state courts as have generally all felonies where Indians have not been involved. Under the Act of February 19, 1875, 18 Stat. 330, the municipal laws and regulations of New York were extended over the leased property and since incorporation as a city in 1913, all petty crimes, Indian or otherwise, have been prosecuted in its City Court. The United States Attorney appearing herein has presented the administrative view that New York State has jurisdiction, citing U. S. v. McBrantney, 104 U. S. 621, and Draper v. United States, 164 U. S. 240. The administrative view and the *de facto* jurisdiction assumed by the New York courts, while not controlling on this decision, should be accorded great weight, having existed a long period of time without any congressional change. See: U. S. v. American Trucking Assns., 310 U. S. 534.

[fol. 17] In view of the foregoing, I hold that Congress has not prescribed exclusive federal jurisdiction over the acts herein for which petitioner has been convicted, and I conclude that New York State law controls unless and until Congress passes legislation superseding it.

Petitioner contends that the rule of U. S. v. Forness, 125 F. (2d) 928, is determinative here. The decision in that case was that Congress having enacted laws with respect to Indian leases in Salamanca, New York State law with respect to leases was superseded. Such is the holding of the Second Circuit, and this opinion is not in conflict therewith. My holding is that Title 25, Sec. 217, U. S. C., does not extend the general criminal laws over the City of Salamanca.

As a result, the state law of New York applies, and the courts of that state correctly and properly assumed jurisdiction in the judgment and sentence of petitioner, and I hold that the motion and petition for the writ of habeas corpus must be denied.

In view of the foregoing, it is unnecessary to decide whether or not petitioner, by failing to raise the question

of jurisdiction in the prior proceedings, has waived his right to do so now.

July 12, 1943.

John Knight, United States District Judge.

Filed July 19, 1943.

[fol. 18] EXHIBIT "B" TO PETITION

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 177—October Term, 1943

(Argued January 13, 1944—Decided January 28, 1944)

UNITED STATES OF AMERICA, ex rel., DONALD A. J. RAY, Relator-Appellant,

vs.

WALTER MARTIN, Warden of Attica State Prison, Respondent-Appellee

Before: Swan, Clark and Frank, Circuit Judges

Appeal from an order of the District Court for the Western District of New York denying relator-appellant's petition for a writ of habeas corpus. Affirmed.

Thomas J. McKenna, Buffalo, New York (James B. McKenna and Benjamin Galperin, of counsel) for relator-appellant; George L. Grobe, Esq. (R. Norman Kirchgraber, of counsel) Buffalo, New York, *Amicus Curiae;* Nathaniel L. Goldstein, Attorney General of State of New York, Wortley B. Paul and Henry S. Manley, Assistant [fol. 19] Attorneys-General, and Beverly S. Galloway, Olean, New York, for respondent-appellee.

FRANK, Circuit Judge:

Relator-appellant was convicted and sentenced in the Supreme Court of Cattaraugus County, New York, to life-imprisonment for murder of a man, in the City of Salamanca, New York, which lies within the Allegany Indian Reservation, all the land within the City of Salamanca being leased from the Seneca Nation. Relator-appellant

is not an Indian, nor was the murdered man. The conviction was affirmed in the Appellate Division of the New York Supreme Court; leave to appeal to the Court of Appeals of that State was denied. In the proceedings in the State court, relator-appellant did not raise the question of jurisdiction. He made no application for a writ of habeas corpus in the State court, but applied for such a writ in the court below. Relying largely on our decision in *United States v. Forness*, 125 F. (2d) 228, he asserted that, under the federal statutes and treaties with the Seneca Nation, the State court had no jurisdiction whatsoever of a trial for murder occurring in Salamanca. The court below made an order denying the application for the writ. From that order relator-appellant appeals.

We agree with the contention made by the State of New York, through its Attorney General, and by respondent, that the application for the writ to a federal court was prematurely made. Save in most exceptional circumstances, the writ will not issue if the relief sought is from [fol. 20] the judgment of a State court where the petitioner has not exhausted his remedies in the State court and has not shown that the State court will not, or cannot, do justice. There is no showing whatever here that justice will be denied in the State court, and none of the exceptional circumstances, noted in the cases cited, here exist.

Affirmed.

CLARK, Circuit Judge (concurring):

I concur in the decision herein on the ground stated in the opinion, as well as upon the additional and alternative ground also relied upon by the District Court, July 19, 1943.

Here the Court cited numerous cases covering the question of the selection of the proper forum for relief. They are not cited because they have no bearing on the present question.

IN COUNTY COURT OF WYOMING COUNTY

RETURN

[Same Title]

To the County Court of Wyoming County:

I, Walter B. Martin, as Warden of Attica State Prison, Attica, New York, in obedience to a writ of habeas corpus issued pursuant to the direction of Honorable Parton Swift, Supreme Court Judge, on the 10 day of February, 1944, on the petition of Thomas J. McKenna, Esq., attorney for relator herein, sworn to the 9th day of February, 1944, which [fol. 21] writ required me as such warden to produce the body of Donald A. J. Ray before Honorable Barber B. Conable, Wyoming County Judge, at a term of court to be held at Warsaw, New York, on the 21st day of February, 1944, at two o'clock in the afternoon, respectfully return:

First: At the time the said writ of habeas corpus was served upon me I had in my custody, as said warden, the body of one Donald A. J. Ray, whom I believe to be the same person mentioned and described in said writ.

Second: That the said prisoner was heretofore received at Attica State Prison, in pursuance of a judgment and commitment under which he is held by me as such warden, a copy of which is hereto attached and marked Exhibit "A".

Third: That the said prisoner is now being held by me by virtue of the final judgment of a court of competent criminal jurisdiction, and said judgment and sentence are still in full force and effect and the sentence of said relator has not expired, and pursuant to the command of said writ I have here before you the body of the said Donald A. J. Ray.

Fourth: That respondent admits the allegations contained in paragraphs First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Fourteenth, Sixteenth, Seventeenth, Eighteenth and Nineteenth, and admits that the crime was committed in the City of Salamanca.

[fol. 22] Fifth: That respondent denies the allegations contained in paragraphs Tenth, Eleventh, Twelfth, Thirteenth and Fifteenth, except as hereinbefore admitted.

Wherefore, the writ of habeas corpus herein should be dismissed and the relator remanded to my custody as

warden of Attica State Prison New York, to be held by me subject to said judgment and commitment.

Walter B. Martin, Warden, Attica State Prison.

(Verified by Wortley B. Paul.)

EXHIBIT "A" TO RETURN

At a term of the Supreme Court held in and for the County of Cattaraugus, in the Village of Little Valley, at the Court House on the 4th day of December, 1939.

Present: Hon. Alonzo G. Hinkley, Justice Presiding

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,

against

DONALD A. J. RAY, Defendant

The defendant above named having been convicted in this Court on the 11th day of December, 1939, of the crime [fol. 23] of Murder in the first degree with a recommendation from the Jury that he be imprisoned for the term of his natural life, personally appears this day for judgment. The defendant is now asked by the Clerk of this Court whether he has any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being alleged or appearing to this Court why such judgment should not be pronounced, judgment is thereupon pronounced that the said defendant be imprisoned at hard labor in the State Prison at Attica, New York, for the term of his Natural Life.

The defendant testifies that he is 20 years of age, and was born in Bradford, Pa., and is by occupation a Laborer.

I Hereby Certify the foregoing to be a true copy of the entry of judgment upon the minutes in the above entitled action.

Witness my hand and the Seal of said Court this 15th day of December 1939.

(S.) Ernest E. Bennett, Special Deputy County Clerk of Cattaraugus County. (Seal.)

From an examination of the records it appears that the defendant above named spent 92 days in a prison or jail prior to his conviction and before his sentence on the within named charge.

(S.) James V. Rogers, Sheriff, Cattaraugus County.

[fol. 24] AFFIDAVIT OF CHARLES E. CONGDON

EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

In the Matter of the Petition of DONALD RAY for a Writ of Habeas Corpus

STATE OF NEW YORK,
County of Cattaraugus, ss:

Charles E. Congdon, being duly sworn, says he is an attorney and counsellor at law duly admitted to practice in this Court, residing at the City of Salamanca, N. Y. That for upwards of forty years last past deponent has resided and practiced his profession in the City of Salamanca, which is located almost wholly on the Allegany Reservation of the Seneca Nation of Indians, and during that time has become and is familiar with the history of the laying out, the location, the boundaries and general situation of said Allegany Indian Reservation and also with the history of the location, settlement and organization of the City of Salamanca.

That the charter of the Colony of Massachusetts Bay granted by King Charles the First in 1628 gave to that Colony a strip of land extending from the Atlantic to the [fol. 25] Pacific which apparently included all western New York State. In 1664 Charles the Second gave to this brother James, the Duke of York, another grant of all the land abutting upon the Connecticut and Hudson's Rivers together with "full and absolute power and authority to correct, punish, pardon, govern and rule all such subjects of us, our heirs and successors as from time to time adventure themselves into any parts or places aforesaid." After the Revolution the conflict of authority and title to the territory then constituting the Colony of New York was settled by what is known as the Hartford Convention adopted December 16, 1786. By this Convention the Commonwealth of Massachusetts ceded to the State of New York forever "all the claim, right and title which the Commonwealth of Massachusetts hath to the government sovereign and jurisdiction of the lands and territories so claimed by the state of New York as hereinbefore stated and particularly de-

scribed." The State of New York ceded to the Commonwealth of Massachusetts "the right of preemption of the soil from the native Indians and all their estate, right, title and property (the right and title of government, sovereignty and jurisdiction excepted)," to lands in western New York which included all of Cattaraugus County. The title to the land in western New York was conveyed by Massachusetts to Robert Morris.

When the Constitution of the United States was approved by the convention of delegates September 17, 1787 and [fol. 26] submitted to the different states it contained the provision in Section 8 that Congress should have power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The grant to Massachusetts Bay may be found at page 94 in the Report on the Indian Problem made to the New York Assembly. February 1, 1889, Assembly Document No. 51, 1889. The grant to the Duke of York is at page 100 in the same book and the Hartford Convention at 105.

The Allegany Indian Reservation was laid out pursuant to a deed dated September 15, 1797 from the Seneca Nation of Indians to Robert Morris whereby the Seneca Nation conveyed to Robert Morris, his heirs and assigns forever a large tract of land in the western part of New York State and including the County of Cattaraugus in which the Allegany Indian Reservation and the City of Salamanca are located, but excepting "one other piece or parcel of 42 square miles at or near the Allegany River." This deed contained the further provision "and it is hereby understood by and between the parties to these presents, that all such pieces or parcels of land as are hereby reserved, and are not particularly described as to the manner in which the same are to be laid off shall be laid off in such manner as shall be determined by the sachems and chiefs residing at or near the respective villages where such reservations are made, a particular note whereof to be endorsed on the back of this deed and recorded therewith, together with all and singular the rights, privileges, hereditaments and appurtenances [fol. 27] thereunto belonging or in anywise appertaining." This deed may be found at length in the New York State Assembly Report on the Indian problem, being Assembly Document No. 51 of 1889 at Page 131. It is also published in United States Senate Documents No. 39, Volume 2 of the 58th Congress, Second Section, at page 1027.

The actual survey of the reservation was made by Richard M. Stoddard commencing September 20, 1798 and completed October 21, 1798. The field notes of this survey are Volume 49 of the Holland Land Company in the office of the New York Secretary of State at Albany. I have a copy of these field notes certified by the Secretary of the State of New York and am familiar with the boundary lines of the Alleghany Reservation adjacent to the City of Salamanca. The street known as Wildwood Avenue in the City of Salamanca is wholly located on the Allegany Indian Reservation laid out as aforesaid.

Pursuant to Act of Congress adopted February 19, 1875 (18 Stat. 330) three commissioners were appointed to lay out certain villages on the Allegany Reservation among which was the Village of Salamanca. These are referred to as U. S. Commissioner's villages, but were not villages in the municipal sense but merely certain limited tracts of land. The municipal Village of Salamanca was organized under its charter which is Chapter 507 of the Laws of 1913. The former municipal village of Salamanca had a police justice and was part of the Town of Salamanca, which [fol. 28] had four Justices of the Peace and who held the customary Justice's Courts within the Village of Salamanca and on the Allegany Indian Reservation until the City of Salamanca was organized in 1913. After that time the territory within the City of Salamanca ceased to be a part of any town and both civil and criminal jurisdiction has been lodged in the City Court created by the City Charter. The City has its own police force, the employees of which are given the powers of constables within the City. The Supreme and County Courts and the Sheriff of Cattaraugus County have always asserted and exercised jurisdiction within the City of Salamanca in exactly the same manner as such jurisdiction has been exercised in the towns of Cattaraugus County outside the Indian reservation. There was formerly for many years a U. S. Commissioner located at Salamanca and a U. S. Deputy Marshal residing there, who exercised the usual powers of U. S. Commissioners and Deputy Marshals, their activities being usually limited to the arrest of persons charged with selling liquor to Indians, but for about twenty-five years last past there has been no U. S. Commissioner or Deputy Marshal located at the City of Salamanca. To deponent's knowledge all crimes which are made such by the Laws of the State of

New York have been prosecuted during the forty years last past within the City of Salamanca in exactly the same way as though they had been committed elsewhere within the County of Cattaraugus in localities not on the Indian Reservation and only such crimes as were charged to have [fol. 29] been committed outside the City of Salamanca or which were peculiarly offenses under the United States statutes have been customarily prosecuted before a U. S. Commissioner or in the District Court of the United States at Buffalo. So far as deponent knows there has not been up to the present time any question raised in the Courts of Cattaraugus County as to the jurisdiction of the Courts of the State of New York over the territory within the City of Salamanca. Several murders and other serious crimes with the prosecution of which deponent has been professionally connected within the past forty years, which were committed within the City of Salamanca have been prosecuted to convictions.

The Act of 1875 above referred to authorized the giving of leases of land within the present City of Salamanca by the Seneca Nation of Indians. Leases of a large part of the territory in said City for twelve years were granted in 1880. When they expired in 1892 they were renewed for the term of Ninety-nine years, pursuant to an Act of Congress approved September 30, 1890 (29 Stat. 558) and substantially all the land in said City including the lands adjacent to Wildwood Avenue are now held under leases for the term of Ninety-nine years, which expire February 19, 1991. By Section 71 of the New York State Indian Law, which was Chapter 188 of the Laws of 1881, the title of the tenants under these ninety-nine year leases is made a freehold estate. The territory within the Commissioner's [fol. 30] villages including Salamanca was made part of the several towns within which they were located and all the general Laws of the State of New York were extended over the territory of these villages.

Prior to the granting of twelve year leases in 1880 there was only a small scattering settlement in what is now the City of Salamanca. Within two or three years subsequent to 1880 numerous brick business blocks and commodious residences were built, the present streets were laid out and since that time the growth of the Village and City has been continuous. The City of Salamanca now has a popu-

lation of about 9,000. The Erie, B. & O. and Pennsylvania Railroads run through the City on the Allegany Indian Reservation. The City contains several large manufacturing plants, a federal post office, two banks, a large high school building, numerous business blocks and substantial private residences. It is inhabited almost exclusively by white people, there being only about six or eight Indian families residing within the City, only one of which owns land within the City.

Charles E. Congdon.

Sworn to before me this 24th day of April, 1943.
C. E. White, Notary Public.

[fol. 31] IN COUNTY COURT OF WYOMING COUNTY

OPINION OF COUNTY JUDGE DENYING WRIT

[Same title]

The relator was indicted by a grand jury of the County of Cattaraugus for the crime of murder in the first degree alleged to have been committed September 16, 1939, in the City of Salamanca in said County. He was convicted upon the second count of the indictment which charged a killing by the relator while engaged in the commission of a robbery. Upon this conviction he is now confined in the Attica State Prison for life. The relator is, and the deceased was, a white man. The relator now claims in this proceeding that his imprisonment is illegal, that the judgment of conviction is void, that the crime was not cognizable by the laws of the State of New York but was solely within the jurisdiction of the Federal Courts. An appeal from the judgment of conviction was taken to the Appellate Division of the Supreme Court where it was affirmed. Leave to appeal to the Court of Appeals has been denied. Neither upon the trial nor in the appellate courts was any question of jurisdiction raised.

The locus of the crime has never been in dispute. The question of jurisdiction is purely a legal one based upon facts undisputed in the record.

The relator petitioned for a writ of habeas corpus to the United States District Court for the Western District of New York. His petition was there denied upon an opinion of Honorable John Knight, United States District Judge, [fol. 32] filed July 19, 1943, upon the ground, first, that the petitioner could not invoke the jurisdiction of a Federal Court upon a writ of habeas corpus until he should have exhausted his remedies in the State Courts, citing *Jones vs. Dowd,* 128 F. 2nd. 331, and *Mooney vs. Holohan,* 294 U. S. 103. Secondly Judge Knight held that the penal laws of the State of New York governed the acts for which this relator was convicted and that the Supreme Court of the State of New York had jurisdiction to try and convict.

This decision was appealed to the Circuit Court of Appeals where it was affirmed, Judge Jerome Frank writing the opinion of the Court, upon the sole ground that the application was made prematurely since the petitioner had not exhausted his remedies in the State Courts. The majority of the Court refrained from expressing any opinion upon the issue as to whether the State court had jurisdiction, but Judge Clark in an opinion concurred upon the additional and alternative ground that the New York Supreme Court had jurisdiction.

We have here a question which ultimately must be passed upon by the Federal Courts. The statutes we are asked to construe are Federal statutes. Nearly all the authorities cited are decisions of Federal courts, but those Courts seem to be inhibited from deciding the matter unless and until the State courts shall have proven that they "will not or cannot do justice." The result is that the question is presented initially to this Court.

[fol. 33] In attempting to decide the issue before us we are indebted and accord great weight to the opinions expressed by United States District Judge Knight and Judge Clark of the United States Circuit Court of Appeals. The briefs furnished us by the respective counsel are most interesting as examples of research and learning along lines both legal and historical.

The question which we are to attempt to decide, as has been indicated, is whether the penal laws of the State of New York as to a non-Indian charged with murder of another non-Indian, within the confines of the City of Salamanca apply, or whether such a crime is solely within the purview of Federal law.

Chapter II of Title 18 of the U. S. Code provides a complete system of penal statutes as applying to (*Sect. 451, Sub. 3*)

> "lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard or other needful building."

Section 468 adopts by reference the definitions of and punishments for acts not made penal by any act of Congress but defined and punished by the laws of the State in which such lands are located. Such acts in such terri- [fol. 34] tory are, nevertheless, crimes under Federal law and ordinarily to be prosecuted in the Federal Courts.

> *Puerto Rico vs. Shell Co.*, 302 U. S. 263, P. 266, citing *U. S. vs. Press Pub. Co.*, 219 U. S. 1, *Franklin vs. U. S.*, 216 U. S. 559.

Section 452 specifically defines as murder the acts of which this relator was convicted. It is not seriously contended that the City of Salamanca explicitly comes within this or the other subdivisions of said section.

Chapter 6 of Title 25, U. S. Code (the section of the Code relating to Indians) defines and prescribes the punishment for certain crimes committed by white men and by Indians within the Indian country under certain conditions.

Section 217 of said Chapter provides as follows:

> "Except as to the crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

The serious contention made by the relator here is that this section, *217*, extends the provisions of *Section 452 of Chapter II of Title 18 of the Criminal Code* to a murder committed by one white man upon another within the City of Salamanca and that the City is "Indian country" under [fol. 35] the meaning of said *Section 217*. In claiming that

the New York Supreme Court lacks jurisdiction he seems to rely upon certain language in the case of *Ex Parte Crow Dog*, 109 U. S. 556, and similar cases, to the effect that all of the lands in the United States to which the Indian titles have not been extinguished are "Indian lands." He relies particularly upon certain extracts from the opinion of Judge Jerome Frank in *United States vs. Forness*, 125 Fed. 2nd 928.

The Federal Constitution, Article I, Section 8, Clause 3, gives the Congress power

> "to regulate commerce with foreign nations, among the states, and with the Indian tribes."

To an increasing extent both the tribes and the individuals within the tribes have been regarded as the wards of the Federal Government. The power of Congress has been implied to extend as to Indians, to crimes committed by them and against them and also to their dealings with non-Indians, whether within the Eastern states where title was originally in the states or in the Western states where title was originally in the United States.

See

People Ex Rel. Cusick vs. Daley, 212 N. Y. 183.
People Ex Parte Crow Dog vs. The U. S., 109 U. S. 556.
U. S. vs. Kagama, 118 U. S. 375.

See also

U. S. vs. McBratney, 104 U. S. 621 and
Draper vs. U. S., 164 U. S. 240.

[fol. 36] As illustrating the extent to which the Federal Government may impose its authority for the benefit of its wards, the Indians, even in territory adjacent to the reservations where the Indian title has been extinguished, reference is made to the case of *Browning vs. U. S.*, 6 Fed. 2nd 801; certiorari denied, 46 U. S. Supreme Court 25.

It seems clear that if the Congress has intended that the criminal laws of the United States shall extend over non-Indians in the City of Salamanca, its intention must prevail. From the spirit of statute and decisional law such extension would seem to be based less upon whether the title of the Indians to the territory involved may or may not have been completely extinguished, than whether

the interests and welfare of the Indians as wards of the United States are involved.

It is argued that under the language of *Ex Parte Crow Dog*, cited above, and other cases, the term "Indian country" as used in said statute applies to the Seneca Reservation, but the question to be decided here is more strictly limited.

If by the enactment of the Act of Congress of February 19, 1875, *C. 90, 18 Statutes at Large 330*, the Congress intended to permit extension to the villages therein provided for, of the criminal laws of the State of New York, and to remove such villages from the category of "Indian country" then, for that purpose, said *Section 217 and Chapter II of Title 18 of the U. S. Criminal Code* do not apply to non-Indians within the City of Salamanca.
[fol. 37] Said *Act of 1875* is set forth in the annotations to *Section 71 of the Indian Law in McKinney's Consolidated Laws of the State of New York.*

It is evident that following the passage of this Act the surveys provided for were made, defining the limits of the villages, including Salamanca. Leases of a large part of the territory for twelve years, were negotiated in 1880. *Chapter 188 of the Laws of 1881 of the State of New York*, now *Section 71 of the New York State Indian Law*, was passed. Later, the Congress by the *Act of September 30, 1890*, enacted that the leases might be renewed for a further term of ninety-nine years subject to all of the other terms and conditions of said *Act of 1875*. While this did not completely extinguish the Indian titles, it did seem to provide for non-Indian occupancy and control, probably permanent. The City of Salamanca was organized in 1913 and now substantially all of the land in the City is occupied under said ninety-nine year leases, by non-Indians. The New York Legislature passing said *Section 188 of the Laws of 1881* referred to the Act of Congress of 1875, adopted much of the language of that Act but provided that

> "all of the general laws of the state are extended over and apply to the same," (said villages).

Evidently this was the contemporaneous understanding of the New York Legislature as to the effect of the Act of Congress. The Supreme Court of the State of New York, the County Court of the County of Cattaraugus, the Jus-

[fol. 38] tices of the Peace of the Town in which the former Village of Salamanca was located, and since the establishment of the City, the City Court, have all exercised criminal jurisdiction over non-Indians within the City of Salamanca. Over the past period of upwards of sixty years their jurisdiction seems not previously to have been questioned.

The case of *Ex Parte Crow Dog, supra,* is not an authority here; that case involved the murder of an Indian by another Indian on a reservation. The case of *United States vs. Forness* was a suit brought to enforce cancellation of certain leases made by the Seneca Nation upon lands in the City of Salamanca where the lessees had persistently defaulted in paying the rentals. The issue decided by the case is that such controversies between the Indians, who are the peculiar wards of the Federal Government, and lessees of lands in the City leased pursuant to the Act of Congress, are subject to the Federal laws and not to the laws of the State of New York. The crux of the decision is in the words,

> "but state law cannot be invoked to limit the rights in lands granted by the United States to the Indians * * *. State law does not apply to the Indians except so far as the United States has given its consent."

There are certain statements in Judge Frank's opinion which the relator believes are favorable to his contention. These we will refer to later. We believe them to be *obiter dicta.* In the case before us, the murder of a white man [fol. 39] by another white man in a city of white men, no consideration particularly affecting the interests or welfare of the Indians is involved. The sole question is whether the white inhabitants of the City of Salamanca are subject to the State or Federal criminal law and within the jurisdiction of the State or Federal courts. The question seems finally to be determined by the interpretation to be put upon the phrase,

> "and all municipal laws and regulations of said State may extend over and be in force within said villages:".

In interpreting this phrase it seems necessary, at the risk of seeming tedious, to analyze the spirit and purposes of said Act of Congress of 1875.

Section 1 of the Act, validated leases formerly made to railroad companies. These leases we understand had been made by supposed authority of State statutes but had been held unauthorized.

See

Buffalo Railway vs. Lavery, 75 Hun 396.
Ryan vs. Knorr, 19 Hun 540.

Here the State had attempted ineffectually to legislate concerning relations between white men and Indians.

But see

New York Ex. Rel. Cutler vs. Dibble, 62 U. S. 149, and
U. S. Ex Rel. Kennedy vs. Tyler, 269 U. S. 13.

Section 2 authorized the appointment of commissioners to locate proper boundaries for Salamanca and other vil-[fol. 40] lages including as far as practicable

> "all lands now occupied by white settlers and such other lands as in their opinion may be reasonably required for the purposes of such villages."

The villages, then, were to be villages of white men and not Indians.

Section 3, in general provided for the making of twelve year leases (later legislation providing for 99 year leases) to be perpetually renewed as provided in the Section by arbitration between the non-Indian lessees and the Indians as lessors.

Section 4 authorized the Seneca Nation to lease lands not belonging to individual Indians, to make such leases as might be authorized by the resolution of its councilors in accordance with the laws and system of government of the Seneca Nation.

Section 5, provided for recording of the leases in the Office of the Clerk of Cattaraugus County and made them subject to the recording laws of the State of New York. It provided that the rights of the lessees (non-Indians) should pass by assignment, will, descent or otherwise as provided by the laws of the State of New York but that the rights of the Indians in such leases should descend as provided by the laws of the Seneca Nation. This section appropriately makes matters of concern to non-Indians subject to white men's law and matters of concern to Indians only,

subject to Indian law. Potential conflicts between Indian lessors and the lessees involving forfeiture of leases and [fol. 41] the like, are, since the Indians have a degree of sovereignty and are the wards of the Federal Government, *extra-mural* matters, so far as the laws of the State of New York are concerned. Such matters are subject to the laws of the United States.

Matter of Forness, 125 Fed. 2nd 928.

Section 7 of the statute attempts to give jurisdiction both to the courts of the State of New York and to the U. S. Courts, probably as a matter of convenience, as to actions for rents, recovery of real property etc. within the villages. This Section is not inharmonious with the spirit of the whole statute as we interpret it. It perhaps was not then understood that, on account of the Federal guardianship of the Indians, a special body of law might develop as to leases made with them, and their enforcement, other than that prevailing generally in the locality where the lands were situated. The Congress could not have anticipated the *Forness* case, which pioneered the law in this regard some sixty-five years later.

Section 8, recognizes that highways extending through the villages and to other parts of the reservation are matters of concern both to the inhabitants of the village and to the Indians on the reservation outside the village. It provides that all the laws of the State of New York concerning highways and bridges shall apply within the villages and, with the consent of the Seneca Nation and Council, may extend [fol. 42] to and be "in force beyond said villages in said reservations or in either of them."

Hereafter occurs the phrase we have quoted above:

> "; and all municipal laws and regulations of said state may extend over and be in force within said villages; provided nevertheless that nothing in this section shall be construed to authorize the taxation of any Indian or the property of any Indian not a citizen of the United States."

In determining the meaning of the phrase "all municipal laws and regulations of said state," we are permitted to and should consider the purpose and spirit of the entire act in which it occurs. We should ascribe to it a meaning in

harmony with its context, not the meaning which gives it "the least possible sense" in that context.

The learned Assistant Attorney-General in his brief points out that in early texts, more generally read in 1875 than now, the term "municipal law" was often used as referring not merely to the laws relating to municipal corporations but to the laws generally of a state or nation applying to its internal affairs, contra-distinctive to international law or laws having to do with extra-mural matters or relationships. He cites *Blackstone's Commentaries* with notes by T. M. Cooley, 2nd ed., Chicago, 1872; Book 1, Sec. 2, Page 43, as follows:

> "Thus much I thought necessary to premise concerning the law of nature, the revealed law, and the law of [fol. 43] nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities or nations, are governed * * *. 'I call it *municipal* law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs.' Municipal law, thus understood, is properly defined to be 'a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.'"

Also *Kent's Commentaries*, 12th edition, edited by O. W. Holmes, Jr. published in 1873, Part III, Page 507:

> "Municipal law is a rule of civil conduct prescribed by the supreme power of a state. * * * Municipal law is composed of written and unwritten, or of statute and common law. Statute law is the express will of the legislature, rendered authentic by certain prescribed forms and solemnities."

Also *Bouvier's Law Dictionary*, 11th ed. Phila. 1862.

> "*Municipal.* Strictly, this word applies only to what belongs to a city. Among the Romans, cities were caller *municipia*; these cities voluntarily joined the Roman republic in relation to their sovereignty only, retaining their laws, their liberties, and their magis-

[fol. 44] trates, who were thence called *municipal magistrates*. With us this word has a more extensive meaning; for example, we call *municipal law*, not the law of a city only, but the law of the state. 1 Bl. Com. Municipal is used in contra-distinction to international; thus we say an offense against the law of nations is an international offense, but one committed against a particular state or separate community, is a municipal offense."

Also "*Lectures Introductory to the Study of Law*," George Sharswood, Philadelphia 1870:

> "*Natural jurisprudence* includes in its survey topics which belong both to Municipal and International Law; that is, both the system of rules which governs a state internally, which we term *Municipal Law*, and that system by which it is regulated in the intercourse and relations with other states, which we call International Law."

Also "*Introduction to American Law*" by Professor Timothy Walker, 6th ed., Boston 1874, Page 47:

> "The grand design of this government would be to unite the people of the *several states* into one nation for *national purposes* only; and accordingly for all *municipal purposes*, each State would still retain its former government, divested, however, of the attributes of complete national sovereignty. * * * Suffice it to say, that each citizen would now owe obedience to two distinct governments, one *national* and the other *municipal* * * *."

[fol. 45] To these citations might be added the third definition of the word "municipal" as given in Webster's International Dictionary, 2nd ed.:

> "3. *Municipal.* Of or pertaining to the internal or governmental affairs of a state, kingdom or nation—used chiefly in the phrase 'municipal law.'"

This view of the meaning of the statute was evidently presented to the Federal Courts in the case of *U. S. vs. Forness*. It seems to us that it should be accorded greater consideration than it received there. In the District Court Judge Knight was of the opinion that the words municipal

laws "were intended to apply only to the State laws for the government and control of villages." If the term were intended to be so limited, it does not seem that the statute is appropriately worded. In their restricted sense "all the municipal laws of the State of New York" would include not only the Village Law but the Town Law, and the County Law, and the General Municipal Law, as well as laws relating to cities and districts of various sorts. Prior to 1874 a great many villages had been set up under special acts of the Legislature. The site of the Village of Salamanca was located within the County of Cattaraugus and also within the boundaries of the Township of Salamanca as well as being part of the Indian reservation.

In the Circuit Court of Appeals Judge Frank dismissed the contention as follows:

> [fol. 46] "When, as in the statute, the 'laws' of a state of the Union are under discussion, there can be no intelligent reference to its international or extra-mural laws for it has none under our Federal Constitution. Appellee's construction would, in effect, read the word 'municipal' out of the statute. 'Municipal laws' of such a state can have but one reference, *i. e.*, the laws of its municipalities. The meaning is the same as when we speak of the 'Municipal Building' of the City of New York."

However, as is stated on *Page 1413 of Volume 42, Corpus Juris*, the adjective "municipal" is

> "more elastic in its meaning, than the word 'municipality' or even than the term 'municipal corporation,' variously defined as, belonging to a city, town or place having the right of local government, belonging to or affecting a particular state or separate community * * *. The term is sometimes used in contra-distinction to 'international' * * *. It has a broader meaning, a more extensive or extended meaning, and is in legal effect the same as public or governmental as distinguished from private."

See also cases there cited.

As to the statement that the State of New York can have no international or extra-mural laws, it would seem that in a sense a state may have and does have laws affected with

an interest outside of the concerns of its own citizens and [fol. 47] even outside its own boundaries. Then, too, the phrase is properly used in contra-distinction to laws of the Federal Government which define relations of the State and its citizens under the Constitution, with other States of the Union and their citizens. We have seen that in 1836 New York State had legislated to authorize Indian leases to railroads, but that the courts had failed to uphold them.

Ryan vs. Knorr, 19 Hun 540.

The statute under consideration, even in its narrower sense, would permit state legislation governing certain relations with the Indians in whom a separate sovereignty is recognized. The statute is legislation which, passed by the State legislature with the consent of Congress, would have an extra-mural significance.

It would seem to us that if the term "all municipal laws and regulations of said state" is to be limited narrowly to mean all of the Village Laws, or even all laws relating only to municipal corporations, the legislation would be inept and ineffectual to accomplish anything but an unworkable and confused result.

The Village Law of 1870 provided for police and police justices within villages. The police justices were vested with the same jurisdiction in civil and criminal matters as justices of the peace. The act further provided that the justices resident in a town where a village was located should have within the village the same civil and criminal jurisdiction which they might exercise outside the village. The question may be asked "What criminal law was it intended [fol. 48] these officers should administer"? Were village police and police justices to administer the village ordinances and the Federal laws? Where would appeals from the decisions of the police justice and the justices of peace be heard? The Town Law gave criminal jurisdiction to Justices of the Peace. The County Law provided for Sheriffs. Federal Law is administered by United States Commissioners and the Federal Courts, and mandates are executed by United States Marshals. Many questions of this sort suggest themselves. It does not seem likely that the Congress could have intended to pass a statute designed to effect legal chaos in the Village or City of Salamanca.

On the other hand it seems that if the broader significance is to be given to the term "all municipal laws and regula-

tions of said State," the statute is understandable and workable. Such meaning seems in harmony with the general purpose and intention of the act. Used in this sense the word "municipal" was most appropriate. If the word "municipal," were to be eliminated, the phrase would be appropriate no longer. It was not, as it seems, intended that *all the laws and regulations of the State* might extend over and be in force in said villages. If the statute had so read it would have been arguable that it authorized other laws, such as had been previously attempted, regulating relations with the Indians. It would have seemed to permit the State to invade a field intended to be reserved to the Federal government as guardian of the Indian tribes.

[fol. 49] If the Congress intended, as we apprehend it did, to pass a statute establishing the villages of non-Indians on the reservation, permitting the laws of the State of New York to govern them so far as their own affairs were concerned, leaving matters purely Indian for regulation according to the institutions and customs of the Indians, but preserving to the Federal government its rights and duties towards its wards the Indians where matters might arise affecting their welfare we can think of no simple phrase which could have been used so aptly as the phrase "municipal laws and regulations," understood in its broader sense.

The fact that in the year 1881 after this Act of Congress was passed and after the surveys had been filed and the leases made, the legislature of the State of New York passed an Act indicating an understanding that the general laws of the State of New York should apply to the villages in question, would seem to be an argument of some weight in favor of the interpretation we are adopting. The facts that for upwards of sixty years the State courts have assumed jurisdiction of criminal matters affecting white people in the City of Salamanca, and that during that period the Federal authorities have disclaimed and down to the present still disclaim jurisdiction, are also arguments that the interpretation suggested was intended by the Congress. As Judge Knight has pointed out, in the construction of a statute of this kind the administrative view is entitled to great weight. He cites *U. S. vs. American Trucking Association*, 310 U. S. 534.

[fol. 50] Where a statute is susceptible of more than one interpretation, contemporaneous and long continued admin-

istrative interpretation of it is especially persuasive. See *annotations 73 U. S. S. C. Law Ed. 322* and *Vol. 84 Law Ed. 28.*

We conclude that the Act of Congress of February 19, 1875, permitted the extension of the penal laws of the State of New York to crimes committed by non-Indians within the City of Salamanca, and that said City is not Indian country within the meaning of *Section 217, Chapter 6 of Title 25 of the U. S. Code.* The Supreme Court of the State of New York had jurisdiction to try and convict the relator and he is held by virtue of a judgment of a court of competent jurisdiction. An order should be entered dismissing the writ and remanding the relator to the custody of the Warden of Attica State Prison.

IN COUNTY COURT OF WYOMING COUNTY

ORDER DENYING WRIT

[Same title]

A writ of habeas corpus having been issued pursuant to the direction of the Hon. Parton Swift of the Supreme Court, on the 10th day of February, 1944, on the petition of Thomas J. McKenna, attorney for Donald A. J. Ray, the relator above named, sworn to the 9th day of February 1944, returnable before the Hon. Barber B. Conable, County Judge of the County of Wyoming at the Courthouse at Warsaw, New York, on the 21st day of February, 1944 at 2:00 o'clock in the afternoon, and a return sworn to the 15th day of [fol. 51] February, 1944 having been filed by the respondent herein, and the record on appeal in the United States Circuit Court of Appeals for the Second Circuit in the case of United States of America, on the relation of Donald A. J. Ray, Relator-Appellant, vs. Dr. Walter Martin, Warden of Attica State Prison, Respondent-Appellee, having been submitted and the affidavit of Charles E. Congdon, sworn to the 24th day of April, 1943, contained therein, having been received in evidence, and the matter having come on to be heard before me, and after hearing Thomas J. McKenna, Esq., attorney for the relator, in favor of sustaining said writ, and Nathaniel L. Goldstein, Attorney-General of the State of New York, by Wortley B. Paul and

Henry S. Manley, Assistant Attorney-General, for the respondent herein, and Beverly S. Galloway, Assistant District Attorney of Cattaraugus County, all in opposition thereto, and the relator, Donald A. J. Ray, having been produced by the respondent and having been present upon the return day of the writ, as aforesaid and due deliberation having been had, and it appearing that the relator is held pursuant to a judgment of a court of competent criminal jurisdiction, and upon my opinion herein dated April 11, 1944, it is

Ordered that the said writ of habeas corpus be, and the same hereby is, dismissed, and that the relator be, and he hereby is, remanded to the custody of the Warden of Attica State Prison, Attica, New York.

Barber B. Conable, County Judge of Wyoming County.

[fol. 52] Clerk's Certificate to foregoing paper omitted in printing.

IN COUNTY COURT OF WYOMING COUNTY

STIPULATION AND WAIVER

[Same title]

STATE OF NEW YORK,
County of Wyoming, ss.:

It is hereby stipulated by and between the attorneys for the respective parties to this proceeding pursuant to Section 170 of the Civil Practice Act that the foregoing copies are true and correct copies of the judgment roll and proceedings before the Honorable Barber B. Conable, notice of appeal, original petition and writ of habeas corpus, original writ, [fols. 53-54] record on appeal, United States Circuit Court of Appeals, Ray vs. Warden, which contained affidavit of Charles E. Congdon and which affidavit, it was stipulated at the hearing of this proceeding was to be made part of the return in this proceeding, opinion of the Honorable Barber B. Conable, and the order denying the writ, as filed in the office of the clerk of the County of Wyoming, and that the

appeal in this case be heard on said papers without certification thereof, which is hereby waived.

Dated: Buffalo, New York, April —, 1944.

Thomas J. McKenna, Attorney for Relator-Appellant; Nathaniel L. Goldstein, Attorney General of State of New York; Wortley B. Paul and Henry S. Manley, Assistant Attorneys-General; Beverly S. Galloway, Esq., Assistant District Attorney of Cattaraugus County.

In County Court of Wyoming County

Order of Settlement

[Same title]

I do hereby certify that the foregoing case and exceptions contains all the pleadings and exhibits before me upon the hearing of the writ of habeas corpus, as more fully appears by the stipulation of the attorneys hereto.

Dated, April —, 1944.

Barber B. Conable, County Judge of Wyoming County.

[fol. 55] In Supreme Court of New York, Appellate Division, Fourth Department

Present: Hon. Benjamin B. Cunningham, Presiding Justice; Hon. Marsh N. Taylor, Hon. William F. Bowling, Hon. Samuel J. Harris, Hon. Francis D. McCurn, Associate Justices.

The People of the State of New York, ex Rel. Donald A. J. Ray, Appellant,

vs.

Walter B. Martin, as Warden of Attica State Prison, Attica, New York, Respondent

Order of Affirmance

The above named Donald A. J. Ray, petitioner in this proceeding, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from an order of

the Wyoming County Court, entered in the office of the Clerk of the County of Wyoming, on the 22nd day of April, 1944, and the said appeal having been argued by Mr. Thomas J. McKenna, of counsel for the appellant, and by Mr. Henry [fol. 56] S. Manley, and Mr. Beverly S. Galloway, of counsel for the respondent, and due deliberation having been had thereon

It is hereby Ordered, that the order so appealed from be, and the same hereby is, affirmed without costs of this appeal to either party.

Opinion by Cunningham, P. J.

All concur.

Enter, B. B. Cunningham. Entered 27th day of September, 1944. Herbert E. Wait, Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 57] In Supreme Court of New York, Appellate Division, Fourth Department

Opinion

Cunningham, P. J.:

The relator was indicted by a grand jury of Cattaraugus County for the crime of murder in the first degree. One of the counts of the indictment charged that the murder was committed by the defendant while he was in the act of committing a felony. It was upon this count that the defendant was found guilty by a jury after a trial in the Supreme Court of Cattaraugus County. The jury recommended life imprisonment and, thereafter on December 15, 1939 the defendant was sentenced to be confined in Attica State Prison for the term of his natural life.

The conviction of relator was appealed to this court and was affirmed. The question of jurisdiction was not raised upon the trial or upon the appeal to this court. After the sentence the relator applied to the United States District Court for a writ of habeas corpus. This was denied by Judge Knight, United States District Judge, upon the ground that such writ could not be allowed until relator had

exhausted his remedy in the state courts and upon the further ground that the Supreme Court of the State of New York had jurisdiction to try and convict him. Upon appeal to the Circuit Court of Appeals, Judge Knight's decision was affirmed upon the ground that the relator was not entitled to a writ until it became apparent that the state courts would not or could not do justice. The question of the jurisdiction of the State Supreme Court was not passed upon. Application was then made to a state court—the County [fol. 58] Court of Wyoming County—for a writ of habeas corpus, the relator claiming that the crime was committed on Indian lands; that the state courts did not have jurisdiction to try him for such crime and that his trial should have been had in a federal court. The appeal now pending before us was taken from the order of the Wyoming County Court which denied such application.

The relator is a white man and the murdered man was a white man.

It is conceded that the place where the crime is alleged to have been committed is in the City of Salamanca, which is within the original limits of Allegany Indian Reservation.

The relator relies upon Section 217, Title 25, U. S. C., reading as follows:

> "Except as to crimes punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country."

The lands in the City of Salamanca are mostly occupied by white people, but the Indians still hold the title to them. However, the Indians have been permitted by act of Congress to lease the lands now included in the City of Salamanca to the people who now occupy them for a term of ninety-nine years, with the right of renewal given to each lessee. (City [fol. 59] of Salamanca v. United States, 125 Fed. (2d) 928; Certiorari denied 316 U. S. 694). The Indians have parted with their right to use and occupy the lands in the City of Salamanca and have passed the control thereof to the lessees.

Lands which are used and occupied by white persons under a grant of the Indian owners are not, in our opinion,

Indian lands within the meaning of the statute relating to Indian lands. The term "Indian Lands" applies only to lands owned by Indians and occupied and used by them. (United States v. Chavez, 290 U. S. 357).

In the early days of this country the various Indian tribes were regarded as foreign nations, and regulations for their welfare and protection and for the protection of their property were made through treaties negotiated between each tribe and the United States. In subsequent years the theory that each Indian tribe was a foreign nation was discarded and the Indians were regarded as wards of the United States, and protection to them and their property was given by acts of Congress and they became subject to the regulations contained in such acts.

For many years this state has held in decisions of its courts and in laws enacted by its Legislature that it had jurisdiction to try Indians for crimes committed against other Indians or their property whether on Indian lands or on other lands in the state. As late as July 1913, the Ap- [fol. 60] pellate Division of this department unanimously affirmed an order of the Supreme Court of Niagara County, holding that the Supreme Court of this state had jurisdiction to try an Indian for a crime committed upon the person of another Indian within the boundary of the reservation on which both lived. (People *ex rel.* Cusick v. Daly, 78 Misc. 657; Affd. 158 App. Div. 892). However, this decision was reversed by the Court of Appeals which held that the power of the state must yield to the paramount authority of the federal government and that under the statutes of the United States the power to try the defendant in that case was vested in the federal courts. (People *ex rel.* Cusick v. Daly, 212 N. Y. 183). This decision does not apply in the case at bar because the jurisdictional facts in the cited case and in this case are entirely different. In the cited case the crime was committed upon an Indian reservation the lands of which were owned by an Indian tribe and were used and occupied by Indians. Furthermore, the crime was committed by an Indian upon the person of another Indian, both of whom were wards of the United States. In the case under consideration the crime was not committed upon lands used and occupied by Indians and was committed by a white man upon the person of another white man.

We believe that the section of the United States statutes relied upon by the relator does not apply to a crime com-

mitted by one white person against another. This statute [fol. 61] was passed to provide for the punishment of crimes committed by Indians on Indian lands and applies to crimes committed by white persons on Indian lands against Indians or their property, but does not apply to a crime committed by a white person against another white person even though committed on Indian lands. The federal courts do not have jurisdiction to try white citizens of the various states for crimes not committed against the federal government or against the wards of the federal government. This is so even though the crime is committed on Indian lands. (United States v. McBratney, 104 U. S. 621; United States v. Bailey, 1 McLean 234).

The order appealed from should be affirmed, without costs.

IN COUNTY COURT OF WYOMING COUNTY

[Same title]

ORDER PURSUANT TO ORDER OF APPELLATE DIVISION AND NOTICE OF ENTRY

An appeal having been heretofore taken from an Order of this Court filed in the Office of the Clerk of the County of Wyoming on the 22nd day of April, 1944, dismissing a Writ of Habeas Corpus and said appeal having been heretofore argued before the Appellate Division of the Supreme Court, Fourth Department and an Order having been entered on the 27th day of September, 1944 by that Court [fol. 62] affirming the Order of the County Court of Wyoming County, and a copy of the Order of the said Appellate Division of the Supreme Court, Fourth Department having been heretofore filed in the Office of the Clerk of the County of Wyoming, a copy of which order is hereto annexed,

Now, on motion of Thomas J. McKenna, attorney for the relator, it is hereby

Ordered, that the Order of the Appellate Division of the Supreme Court, Fourth Department, affirming the Order of this Court is hereby made an order of this Court.

Dated: October 13, 1944.

Barber B. Conable, County Judge, Wyoming County.

SIR:

Take notice of an Order of which the within is a copy, duly granted in the within entitled action, on the 13th day of

October, 1944, and duly entered in the office of the Clerk of the County of Wyoming on the 13th day of October, 1944.

Dated: Buffalo, N. Y., October 14, 1944.

Thomas J. McKenna, Attorney for Relator, Office & P. O. Address, 706 Morgan Building, Buffalo 2, New York.

[fol. 63] In Supreme Court of New York, Appellate Division, Fourth Department

Present: Hon. Benjamin B. Cunningham, Presiding Justice; Hon. Marsh N. Taylor, Hon. William F. Dowling, Hon. Samuel J. Harris, Hon. Francis D. McCurn, Associate Justices.

[Same title]

Order Denying Motion for Reargument and Leave to Appeal to the Court of Appeals

The above named Donald A. J. Ray, appellant herein, having, on the 24th day of October, 1944, duly moved before this Court for an order granting to him a reargument of the appeal herein or in the alternative leave to appeal to the Court of Appeals from the order of affirmance heretofore and on the 27th day of September, 1944, duly made and entered herein by this Court,

Now, after reading and filing the affidavit of Thomas J. McKenna, verified the 16th day of October, 1944, the notice of said motion, together with proof of due service thereof upon counsel for the opposing party, and upon all the proceedings heretofore had and taken herein, after hearing Mr. Thomas J. McKenna, of counsel for appellant, in favor of said motion, and Mr. Nathaniel L. Goldstein, of counsel [fol. 64] for respondent, in opposition thereto, and due deliberation having been had thereon,

It is hereby Ordered, That the motion for reargument be, and the same hereby is, denied, and that the motion for leave to appeal to the Court of Appeals be, and the same hereby is, denied.

Enter, B. B. Cunningham.

Entered 1st day of November, 1944.
Herbert E. Wait, Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 65] IN COURT OF APPEALS OF NEW YORK

Present: Hon. Irving Lehman, Chief Judge, Presiding.

[Same title]

ORDER GRANTING MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS—November 30, 1944

A Motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the relator-appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is granted.

A Copy.

Raymond J. Cannon, Deputy Clerk. (Seal.)

[fol. 66] IN COUNTY COURT OF WYOMING COUNTY

[Same title]

NOTICE OF APPEAL FROM JUDGMENT PURSUANT TO LEAVE OF COURT OF APPEALS

SIRS:

Please Take Notice that, pursuant to leave granted by the court of appeals of the state of New York in the above entitled action, by an order duly made and filed in the office of the clerk of that court on the 30th day of November, 1944, the above named relator-appellant hereby appeals to the court of appeals from the judgment of affirmance herein entered in the office of the clerk of the county of Wyoming on the 13th day of October, 1944, pursuant to the order of the said appellate division, duly entered herein, and which judgment in all things unanimously affirmed the judgment of the County Court, Wyoming County, entered herein on the 22nd day of April, 1944, and this appeal is from each and every part of said judgment.

Dated: Buffalo, New York, December 6, 1944.

Yours, etc., Thomas J. McKenna, Attorney for Relator-Appellant, Office & P. O. Address, 706 Morgan Building, Buffalo 2, New York.

[fol. 67] To: Nathaniel L. Goldstein, Attorney General of State of New York; Wortley B. Paul and Henry S. Manley, Assistant Attorneys-General, appearing for the State of New York and the Warden of Attica State Prison, State Office Building, Albany, New York; Beverly S. Galloway, Esq., Assistant District Attorney of Cattaraugus County, Office & P. O. Address, 514 Exchange National Bank, Olean, New York; Maurice F. Martin, County Clerk, County of Wyoming.

In County Court of Wyoming County

Stipulation and Waiver

[Same title]

It Is Hereby Stipulated by and between the parties hereto or their respective attorneys, pursuant to Section 170 of the Civil Practice Act, that the foregoing copies are true and correct copies of the judgment roll, the order of the Appellate Division, notice of appeal and the judgment of the Appellate Division as filed in the office of the clerk of the County of Wyoming and of the whole thereof, and [fol. 68] that the appeal in this case be heard on said papers without certification thereof, which is hereby waived.

Dated: Buffalo, New York, December 9, 1944.

Thomas J. McKenna, Attorney for Appellant-Plaintiff. Nathaniel L. Goldstein, Attorney General of State of New York. Wortley B. Paul and Henry S. Manley, Assistant Attorneys-General, appearing for the State of New York, and the Warden of Attica State Prison. Beverly S. Galloway, Esq., Assistant District Attorney of Cattaraugus County.

[fol. 69] IN THE COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. DONALD A. J. RAY, Appellant,

against

WALTER B. MARTIN, as Warden of Attica State Prison, Respondent

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered September 27, 1944, which unanimously affirmed an order of the Wyoming County Court (Conable, J., opinion 181 Misc. 925) dismissing a writ of habeas corpus and remanding relator to the custody of respondent, as warden of Attica State Prison.

Thomas J. McKenna, James B. McKenna and Benjamin Galperin for appellant.

Nathaniel L. Goldstein, Attorney-General (Henry S. Manley, Orrin G. Judd and Wortley B. Paul of counsel), for respondent.

Beverly S. Galloway, Assistant District Attorney, Cattaraugus County.

OPINION—March 1, 1945

DESMOND, J.:

Relator is serving, in a New York State Prison, a life sentence imposed on him by the Supreme Court of the State of New York on December 15, 1939, for the commission, at the City of Salamanca, in Cattaraugus County, New York, of a "felony murder" (Penal Law, Sec. 1044, Subd. 2, Sec. 1045-a). Almost the whole of the City of Salamanca, including the scene of the killing, is within the bounds of the Allegany Reservation of the Seneca Nation of Indians. Relator is not an Indian, nor was his victim, one Paul Balsiger. In this habeas corpus proceeding relator asserts that the Supreme Court of this State was without any jurisdiction of his offense, committed as it was on an Indian reservation. No such challenge to the juris- [fol. 70] diction was made during relator's trial or on his appeal to the Appellate Division from the judgment of conviction, which appeal resulted in an affirmance by that

court (259 App. Div. 1065), or on a subsequent motion, denied by a Judge of this court, for leave to appeal to this Court. We hold, nonetheless, that the alleged jurisdictional question may properly be raised by these habeas corpus proceedings. (See People ex rel. Carr v. Martin, 286 N. Y. 27, 31, 32.) Special Term and the Appellate Division, fourth department, both wrote opinions (181 Misc. 925 and 268 App. Div. 218) in dismissing the writ. We granted leave so that we might, if possible, set at rest any doubts as to whether the Penal Laws of this State apply to crimes committed in the city of Salamanca. The respective counsel have furnished us with extensive reviews of the writings on the very large subject of the jurisdiction of tribal, Federal and State courts over Indian reservations in the United States. We content ourselves with a statement of the bases for our conclusion that relator was properly indicted, tried and punished in the Supreme Court, despite the undoubted fact that the crime was committed on lands which form part of an Indian reservation. In general, our reasons for that conclusion are these: that there is no basis in any treaty, Constitution or statute for an assertion by the Federal government of exclusive jurisdiction over crimes committed by non-Indians against non-Indians on this reservation, that such jurisdiction has historically, by common consent and for sound legal reasons been assumed to exist, by the Federal and State courts in New York and elsewhere, that this is peculiarly so as to the reservations of the "Six Nations" in New York State, and, finally, that there is a Federal statute making applicable to the city of Salamanca the general laws of the State of New York.

The Allegany reservation of the Seneca Indians is wholly within New York State, has an area of about forty-two [fol. 71] square miles and extends along both sides of the Allegany River, north from the Pennsylvania border. It is a part of the much more extensive lands occupied by the Seneca nation before the American Revolution. Before our Federal Constitution was adopted, those Seneca lands were within the bounds of the State of New York. The Allegany reservation was, accordingly, not created by the Federal government out of United States government lands within the State, and was never at any time territory of the United States. (Seneca v. Christie, 126 N. Y. 122, 136, affd. 162 U. S. 283.) During colonial days there had been

a protracted quarrel between New York and Massachusetts over a large territory (several millions acres) including much of present-day western New York, each colony claiming that its royal charter gave it sovereignty and jurisdiction over the disputed tract. In 1786, after the Declaration of Independence but before the adoption of the Federal Constitution, a compact was entered into between the sovereign States of Massachusetts and New York by the terms of which compact New York was recognized as having sovereignty and jurisdiction over the lands and Massachusetts was recognized as the owner of the "right of preemption" of the lands themselves, including the right to extinguish such title as the Indians had. This compact, subsequently ratified by the Congress of the United States, authorized Massachusetts to grant and convey the right of pre-emption, as to any part of the lands involved, "to any person or persons, who by virtue of such grant, shall have good right to extinguish by purchase the claims of the native Indians * * *". Massachusetts in 1791 conveyed its title, subject to the Indian claims, to Robert Morris, who later conveyed it to the Holland Land Company, Morris agreeing to extinguish the Indian rights at his own expense. He did so in 1797 when at a great council of the Senecas held at Geneva, New York, he received from the Seneca Nation a conveyance of all the lands [fol. 72] purchased by him from the State of Massachusetts, excepting certain Indian reservations, including the Allegany reservation with which we are here concerned. The council was held and the conveyance made with the approval of the government of the United States, as represented by its Commissioner. (See discussions of these transactions in Seneca v. Christie, supra, and Jemison v. Bell, 186 N. Y. 493, 497.)

Previously to the Geneva Council, and in 1794, there had been entered into at Kon-on-daigua (Canandaigua, N. Y.) a treaty between the United States of America and "the Tribes of Indians called the Six Nations" (including the Seneca Nation). By it "peace and friendship" were to be "firmly established" forever, between the United States and the Six Nations. The treaty contains a description by metes and bounds of the lands of the Seneca nation, with an acknowledgement by the United States that the described lands were the property of that nation, and a promise by our government that the possession thereof by the Senecas

would never be disturbed. The Senecas, on their part, covenanted that they would never claim any other lands within the boundaries of the United States. By Article V the Senecas ceded to the United States the right to build a wagon road through part of their lands (not the Allegany reservation) and the right of free passage through all the Seneca lands. Article VII of that Treaty of 1794 is one of relator's main reliances. By that article it was stipulated that, "lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, * * * for injuries done by individuals on either side, no private revenge or retaliation shall take place, but, instead thereof, complaint shall be made by the party injured to the other". If the depredation was by Indians, the complaint was to be made by the President, or a superintendent by him appointed, to the principal chiefs of the Six Nations [fol. 73] or any of them; if the "private injury" was by whites, then the complaint would go from the Indian nation to the President, or his superintendent. Upon the entry of any such complaint, says article VII, "such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken until the legislature (or great council) of the United States shall make equitable provision for the purpose". Relator treats that last-quoted sentence as "provision for future federal legislation which would cover the crime in question when committed within the Allegany reservation". He says that the language "expressly excluded State laws from application to this reservation". We cannot agree that it had any such meaning or effect, or that it referred at all to the question of what system of internal law should thereafter operate within the tribal lands. The treaty was, in substance as well as form, a true treaty, made between the United States of America and the quasi-sovereign Six Nations. It was made not to set off lands to the Indians or to provide for their government, but as a treaty of peace to put an end to a state of war and guard against its recurrence. For this purpose, border raids or other incursions were to be treated as "international incidents", and diplomatic representations thereupon were to be made by the aggrieved signatory to the other. The Treaty of 1794 was one of a long series of actual treaties made between the United States and Indian tribes until the practice was abolished in 1871. (See Seneca v. Christie, supra; Turner v. American Baptist etc., 5 McLean

344, 349; United States v. Whiskey, 93 U. S. 188.) It did not create any Indian reservation but confirmed the Senecas' aboriginal right of possession. (See United States v. Santa Fe, 314 U. S. 339.) Nothing in the language of the pact, the circumstances giving rise to it, or the history of proceedings under it, furnish reason for holding that it had anything to do with the future domestic government of [fol. 74] the reservation or that the reference to "the legislature or great council of the United States" in itself conferred on Congress any power of any sort to legislate as to such matters. If such a meaning had been intended, appropriate language was available. (See, for instance, treaty provision quoted in United States v. 43 Gallons whiskey, supra, 93 U. S. at p. 193.)

Of course, Congress had, from other sources, jurisdiction over the Indians and their lands and their affairs. By Federal Constitution provision (art. 1, Sec. 8) and perhaps ex necessitate (See Board v. Saber, 318 U. S. 705, 715), the Indian tribes have always been to some degree dependents of the government of the United States and their members have been wards of that government, receiving its care and protection. (United States v. Kagama, 118 U. S. 375; United States v. Sandoval, 231 U. S. 28; United States v. Klamath, 304 U. S. 119.) The power of Congress over the Indians and their tribal affairs and domains is paramount and of a most sweeping character. (Worcester v. Georgia, 31 U. S. 515.) The courts of this State, as well as the Federal courts, have consistently recognized that this paramount power in Congress is applicable to the affairs of the Six Nations within New York State. (People ex rel. Cusick v. Daly, 212 N. Y. 183, 196; Mulkins v. Snow, 232 N. Y. 47, 51; United States ex rel. Kennedy v. Tyler, 241 U. S. 556, affg. 294 F. 111.) But, while the tribal Indians, being wards of the national government, are not generally amenable to State laws nevertheless the lands in any State occupied by Indians is still part of the State unless expressly excluded therefrom. (See Thomas v. Gay, 169 U. S. 264, 274, 275; Utah v. Fisher, 116 U. S. 28.) The exclusive control of the Federal government over Indians extends only so far as is required by the pupilage of the wards and has to do only with government and protection of the Indians themselves. (Utah v. Fisher, supra.) Congress may exercise that jurisdiction by legislating concerning crimes committed [fol. 75] by Indians or against Indians within a reservation.

(Donnelly v. United States, 228 U. S. 243.) But that jurisdiction over the Indians has nothing at all to do with the transactions of white men among themselves not affecting the persons or property of Indians, on or off a reservation. Accordingly, it has been held in many State and Federal decisions, and apparently never until now questioned, that to oust the criminal courts of a State from jurisdiction over crimes committed by a non-Indian against a non-Indian, more must be shown than the single fact that the crime was committed on an Indian reservation. (See Donnelly v. United States, supra; United States v. McBratney, 104 U. S. 621; State v. Monroe, 83 Mont. 556; People v. Pratt, 26 Cal. App. 2d 618; State v. Lindsay, 133 Wash. 140; State v. Adams, 213 N. C. 243; United States v. Partelle, 48 F. 670.) To allocate jurisdiction over such crimes to the Federal courts, there must be shown some treaty or act specifically so commanding. (United States v. Partelle, supra; see Draper v. United States, 164 U. S. 420.) The reason is simply this: the original thirteen states and those later admitted into the Union on an equal basis with the original thirteen, have general criminal jurisdiction over all non-Indian persons within the State limits, including Indian reservations. (United States v. McBratney, supra.) Even as to Indians, the national government's exclusive jurisdiction of the crimes over which it has by statute assumed jurisdiction, applies only to Indians living "in the tribal relations" (Peters' case, 2 Johns. Cases 344; People ex rel. Cusick v. Daly, supra, 212 N. Y. at p. 193.) It is a jurisdiction stemming from the power to legislate in "Indian affairs" and not embracing all occurrences on Indian lands. The case of the New York Indians (5 Wall. 761), is not to the contrary; it forbade State taxation of tribal lands on this reservation because such taxation would be "offensive to the tribal relations" (p. 771). Cases like [fol. 76] Pickett v. United States (216 U. S. 456), merely show that in the later-admitted states the Federal government may, and sometimes did, in granting statehood, or in creating Indian reservations out of lands owned by the United States, expressly reserve exclusive jurisdiction on such Indian lands, as to all justiciable matters. No such situation has ever existed in New York State. In 1834, Supreme Court Justice McLean held at Circuit (United States v. Bailey, 1 McLean 234) that a United States Court could not try a white man for killing another white man on a

Cherokee reservation. "The State of New York" he noted (p. 239) "for many years has punished its citizens for crimes committed in the Indian territory within its limits".

Assuming that Congress could by statute take or keep for itself exclusive legislative control over the crime of murder, by whomever perpetrated, in the Allegany reservation, where is there any such statute? Relator relies on United States Code, Title 18, Sections 451 and 452 and United States Code, Title 25, Section 217. The first two of those sections (U. S. Code, Title 18, Sections 451, 452), so far as important here, define, and provide for the punishment of murders "committed within or on any lands * * * under the exclusive jurisdiction (of the United States)". We find no ground whatever for a holding that the Allegany reservation was ever "under the exclusive jurisdiction" of our Federal government. Ultimately, relator's opposing argument stands or falls on his own construction of the Treaty of 1794, a construction which we have rejected in preceding paragraphs of this opinion and which has never in practice been accepted by any branch of either the New York State or the United States Government. In the other statute (U. S. Code, Title 25, Section 217) urged upon us by relator as empowering the United States Courts alone to deal with murders done on reservations, the language is that, with exceptions not here relevant, "the general laws [fol. 77] of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States * * * shall extend to the Indian country." Relator says that the Allegany reservation, including the City of Salamanca, is "Indian country." Without passing squarely on the point, we conclude that there is some basis for it. "Indian Country", archaic as the phrase now sounds, still seems to comprehend any unceded land, such as a reservation, occupied by an Indian tribe—any place to which the Indian title has not been extinguished. (Donnelly v. United States, supra; Bates v. Clark, 95 U. S. 204; ex parte Crow Dog, 109 U. S. 556; Pronovost v. United States, 232 U. S. 487; United States v. Pelican, 232 U. S. 442; United States v. Chavez, 290 U. S. 357.) We may doubt whether the phrase "Indian country" ever did have any meaning in connection with the Six Nations and more doubt as to whether it could, in any event, be reasonably applied to Salamanca, in which live only a handful of Indians and which is, by State statute and Act of

Congress (as we shall see hereafter) a white man's city. Only by main force, we think, could the term be applied to a city all of the lands of which have, by corporate action of the Seneca Nation and with the express consent of Congress (see later discussion of the Act of 1875) been leased to white persons. "A country without Indians could hardly be considered an Indian country" (United States v. Richard, 1 Ariz. 31, 39, 40). But, whether or not Salamanca is still "Indian country" in some sense or other, we state with confidence that the particular statutes cited by relator have never been considered as giving the Federal courts absolutely exclusive jurisdiction of crimes, whether committed by Indians or Whites, on the New York State reservations. In Benson v. United States (44 F. 178), the Circuit Court, reversing a conviction, held that Benson, operating a tavern in Salamanca, was not guilty of introducing intoxicating liquors into the "Indian country" (see U. S. Code, Title [fol. 78] 25, Section 241.)

In Mullins v. Snow (232 N. Y. 47, 50, 51), this court recognized, but did not define the limits of, the power of the State to legislate even in some respects "for the tribal Indians living on reservations" and referred to power of Congress as being one "to legislate for them (the Indians) within their reservation." The Supreme Court, in State v. Dibble (62 U. S. 149), referring to a New York State statute relating to intrusions of white men on Indians lands, and speaking specifically of the Tonawanda reservation of the Senecas, said: "Notwithstanding the peculiar relation which these Indians hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as was necessary to preserve the peace of the commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a state to make such regulations to preserve the peace of the community is absolute, and has never been surrendered." It would take too long to list the various assumptions by New York State of various kinds of control over the Indians themselves, and the ratifications and recognitions thereof by the Federal government and courts. (See United States ex rel. Kennedy v. Tyler, supra.) Justice Andrews, later of this court, wrote in a memorable opinion (George v. Pierce, 85 Misc. 105, 122): "Our Courts have assumed criminal jurisdiction over them (the Six Na-

tions). Our legislature has asserted their right so to do. And this jurisdiction has been mentioned by the Supreme Court of the United States without disapproval." Justice Andrews, recalling that the Indians of the Six Nations were in fact wards of this State at the time it became an independent sovereignty on the adoption of the Declaration of Independence and that among other sovereign rights of the State, as successor to the British Crown before the adoption of the Constitution, was its protectorate over the [fol. 79] Indian tribes, pointed out that New York never transferred to the general government any rights over the Indians except as expressed in the Federal Constitution, and that, in a broad sense, the Indians of the Six Nations are, unlike the Western Indians "wards of the State—not of the United States" (85 Misc. at p. 120). From all of this, it is plain enough, we think, that the doubts and vagueness that becloud the general subject of law on Indian reservations, have nothing whatever to do with criminal prosecutions like that of this relator for the killing of Paul Balsiger, in Salamanca, New York, in 1939.

In an earlier paragraph of this opinion we stated, as one of the bases for our conclusion herein, that there is a Federal statute which makes applicable to the city of Salamanca, the general laws of the State of New York. That enactment (U. S. Code, Title 18, Stat. 330 Ch. 90) was passed by Congress in 1875. It provides as to Salamanca (then a village) and several other named villages in the Allegany reservation that "all municipal laws and regulations of said State (New York) may extend over and be in force within said villages." From the historical background of the statute, the setting of the quoted language therein, and from subsequent authoritative interpretation given it by the New York Legislature, it is plain to us that "all municipal laws and regulations of said State" means all the internal, domestic laws of the State. Our arrival at that conclusion has not been a hasty or incautious one, conscious as we are that the United States Circuit Court of Appeals has, in United States v. Forness (125 F. 2d 928, cert. den. 316 U. S. 694) interpreted somewhat differently the phrase of the statute: "municipal laws." As always, we give due and great respect to the construction by a Federal court of a Federal statute, but we are not strictly bound in such matters by any but United States Supreme Court decisions. In this instance we feel constrained to

[fol. 80] make our own independent decision. We are called upon in this case to decide whether or not there exists any legal basis for the undisputed enforcement in Salamanca, for the past sixty-five years or more, of the general penal laws of this State. The Circuit Court of Appeals did not have any such broad question before it in the Forness case. The Forness case was brought on behalf of the Seneca Nation, in ejectment, to oust one of the white lessees for nonpayment of the rent due from him to the Nation. One of the issues before the Circuit Court was as to the applicability to such a lawsuit between the tribe and a white individual, of sections 997-999 of the New York Civil Practice Act, particularly section 999 which permits payment into court, at any time before judgment, of the rent due, with costs, and requires a dismissal of the action, on such payments being made. Whatever the words "municipal law" may mean in the case we have before us on this appeal, or in other connections, it is entirely clear that Congress, validating the Indian leases and reserving a measure of Federal control over the leased lands, could not have intended by the 1875 statute to make applicable to controversies over those leases the New York laws as to remedies of the lessor on a default by the lessee. As the Special Term said in the present case, interpreting section 5 of the 1875 statute: "Potential conflicts between Indian lessors and the lessees involving forfeiture of leases and the like, are since the Indians have a degree of sovereignty and are the wards of the Federal government; extra-mural matters, so far as the laws of the United States are concerned. Such matters are subject to the laws of the United States."

We agree with the Circuit Court of Appeals that "municipal laws" has two meanings. Broadly and classically it means the laws pertaining to the internal government of a State or nation. (See 1 Blackstone Comm. 44; People v. Tiphaine, 3 Parker Cr. Rep. 244.) In its more modern and narrower connotation it means those laws which pertain to towns, cities and villages and their local govern- [fol. 81] ments. Intrinsically the words may have either of those meanings. But historical research, we believe, establishes that the broader and older intendment must have been the one used by Congress. The statute was passed because of a pressing difficulty. Long before 1875, Salamanca and several other villages of white men had

sprung up on the Allegany reservation, and the white settlers and several railroad companies who built their lines through the reservation lands, had made their improvements on the faith of land leasses from the Indians. Although confirmed by act of the New York Legislature of this State passed and transmitted to Congress a resolution (L. 1875, p. 819) requesting the latter body to pass some law "for the relief of said white settlers." Soon thereafter, Congress on February 19, 1875, enacted the law we are here construing. After providing for appropriate validation of the leases, the statute in its last paragraphs, says this: "That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages (including Salamanca), and may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said villages in said reservations, or in either of them; and all municipal laws and regulations of said State may extend over and be in force within said villages: Provided, nevertheless, that nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States." The best possible clue to the meaning of "all municipal laws and regulations of the State" as used in the Act is found in the action taken by our State Legislature, after Congress had acceded to its request by passing the statute above described. Apparently the new leases authorized by the Federal Act were entered into in 1880. In 1881, our Legislature, undoubtedly as a sequel to that passage of the Federal Act, put on our statute books chap- [fol. 82] ter 881 of the Laws of that year, now section 71 of our State Indian Law, wherein, changing the word "municipal" to "general" it directed that "all the general laws of the state are extended over and apply to the same (the villages of Salamanca et al)". From that day until the Forness case (supra) was decided, no one has ever expressed a doubt, as far as any record shows, that the word "municipal" as used by Congress and the word "general," as used by our Legislature, meant exactly the same thing, and that both words included and envisaged the whole State system of laws for the internal government of the residents of the village, and not merely minor local ordinances, or State laws dealing with the details of village government. Such a use of the phrase "municipal

law" was technically and scientifically correct for the result intended. The Act of 1875 was an act of cession in the sense that it ceded to the State such governmental jurisdiction as the national government or the Seneca Nation might otherwise have or been thought to have, over the white villages. (Incidentally such cessions or relinquishments of Federal control over the government of Indian lands are not unusual and are considered legal even in contravention of treaties. (See Lone Wolf v. Hitchcock, 187 U. S. 553, 566, 567; Tiger v. Western, 221 U. S. 286, 315; Shoshone v. United States, 299 U. S. 476, 497). To describe the body of law which was to be operative in such ceded territory, the phrase "municipal laws" was appropriate and conventional. In Chicago v. Pacific Railroad Co. (1885) (114 U. S. 542), the Supreme Court was called upon to decide whether a State statute remained in effect on the Fort Leavenworth Military Reservation after the State of Kansas had ceded to the United States exclusive jurisdiction therein. A quotation from that opinion (p. 546) will show better than extended argument *now* apt and necessary was the phrase "municipal laws" to convey [fol. 83] the idea that in the Village of Salamanca, private property and private conduct were to be regulated by the laws of the State of New York: "It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign". (For similar uses of the word "municipal" see Halleck. Int. Law (1st ed., 1861), ch. 33, Sec. 14; Vilas v. Manila, 220 U. S. 345, 347; Murray v. Gerrick, 291 U. S. 315, 319.) Thus we see that the clause "all municipal laws and regulations of said State may extend over and be in force within said villages" was a short but scientifically complete way of eliminating any doubt as to whether, after the Act's passage, the laws affecting private rights of the residents of the villages would be those of the United States, or the Seneca Indians, or the State of New York. The Circuit Court of Appeals thought that giving "municipal laws" its more ancient meaning, i. e., of general State laws as opposed to international laws, would result in an absurdity since, said that court, the

State of New York, had no international relations or international law. But the villages and their villagers did have and continued to have a relationship, based on their leases, with the still quasi-independent Seneca Nation.

Relator argues that the specific reference in the above quoted 1875 Congressional statute to state laws concerning highways and bridges shows that the later-used term "municipal laws" had no application to State laws. On the contrary, we think that the statute itself shows why the highway and bridge laws were separately mentioned, i. e., [fol. 84] because the Seneca nation in council was to have the right to extend those laws to the whole reservation.

The order should be affirmed.

Lehman, Ch. J., Loughran, Lewis, Conway, Thacher and Dye, JJ., concur.

[fol. 85] IN COURT OF APEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 1st day of March in the year of our Lord one thousand nine hundred and forty-five, before the Judges of said Court.

Witness, The Hon. Irving Lehman, Chief Judge, Presiding.
John Ludden, Clerk

THE PEOPLE &c., ex rel. DONALD A. J. RAY, Appellant,

against

WALTER B. MARTIN, as Warden of Attica State Prison, &c., Respondent

REMITTITUR—March 2, 1945

Be It Remembered, that on the 26th day of December in the year of our Lord one thousand nine hundred and forty-four, Donald A. J. Ray, the appellant in this cause, came here unto the Court of Appeals, by Thomas J. McKenna, his attorney, and filed in the Court *Court* a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department.

And Walter B. Martin, as Warden of Attica State Prison, &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General, and another, his attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Thomas J. McKenna of counsel for the appellant, and by Messrs. Henry S. Manley and Beverly S. Galloway of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Wyoming County, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Wyoming County, before the Judge thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court before the Judge thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

[fol. 86] Court of Appeals, Clerk's Office,
Albany, March 2, 1945.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 87] In County Court of Wyoming County

The People of the State of New York ex Rel. Donald A. J. Ray, Petitioner,

against

Walter B. Martin, as Warden of Attica State Prison, Attica, New York, Respondent

Order on Remittitur

An order having been made by this Court and entered in Wyoming County Clerk's Office on April 22, 1944, to the following effect:

> "Ordered, that the said writ of habeas corpus be, and the same hereby is dismissed, and that the relator be, and he hereby is, remanded to the custody of the Warden of Attica State Prison, Attica, New York."

And appeals to the Appellate Division, Fourth Department, and to the Court of Appeals, from such order and an order affirming it, having resulted in each successive appeal in affirmance, and the Court of Appeals having sent hither its remittitur to the effect that the order of the Appellate Division affirming the order of this Court be affirmed; now therefore, upon such remittitur and the previous proceedings herein, and upon motion of the Attorney-General, it is hereby,

Ordered, that such remittitur and this order be filed in the office of the Clerk of this Court, and become parts of the record herein.

March 8th, 1945.

Barber B. Conable, County Judge of Wyoming County:

[fol. 88] In the Supreme Court of the United States

[Title omitted]

Petition for Appeal

To Hon. Robert H. Jackson, Associate Justice of the United States Supreme Court:

The above named Donald A. J. Ray, feeling aggrieved by the judgment of the County Court of the State of New York entered in the Clerk's Office of the County of Wyo-

ming, at Warsaw, New York, on March 8, 1945, upon the remittitur and final decision of the Court of Appeals of the State of New York handed down on March 1, 1945, in this cause, which said court is the highest court of the State of New York in which a decision in this suit and matter could be had, hereby prays for the allowance of an appeal herein to the Supreme Court of the United States to the end that said judgment and the decision of the said Court of Appeal upon which the same was entered, may be there reviewed and considered and justice done this appellant, and that an order be made allowing such appeal, fixing the amount of the bond required of the petitioner herein on such appeal, and that a transcript of the record proceedings and papers in this cause duly authenticated by the Clerk of the County Court of the County of Wyoming, New York, under the hand and seal of such court may be sent to the Supreme Court of the United States as provided by law.

The Court of Appeals affirmed an order of the Wyoming County Court entered in the office of the Clerk of the County [fol. 89] of *of* Wyoming at Warsaw, New York, on the 22nd day of April, 1944. The order dismissed a writ of habeas corpus and remanded relator to the custody of respondent as Warden of Attica State Prison. The order of the Court of Appeals was made an order of the Wyoming County Co-rt by the filing of the remittitur of the Court of Appeals dated March 2, 1945, together with an order making the judgment of the Court of Appeals the judgment of County Court in the office of the Clerk of the County of Wyoming at Warsaw, New York, on March 8, 1945. The order of the Appellate Division making the order of that court the order of the County Court and the remittitur of the Appellate Division was signed and filed and entered in the Office of the Clerk of the County of Wyoming on the 13th day of October, 1944.

That thereby said judgment became and is the final judgment of the highest court of the State of New York in which a decision in this cause could be had and that the County Court of the State of New York has possession of the record in this cause.

Petitioner respectfully shows that this cau.e is one in which a review can be had in the Supreme Court of the United States as a matter of right in that a final judgment has been rendered in the highest court of the State of New

York in which a decision could be had, and that the validity of statutes of the State of New York was drawn in question on the ground of their being repugnant to the Constitution, the Treaties and Statutes of the United States and the decision was in favor of their validity.

Opinions rendered by the Courts below are reported in Matter of Ray, 54 Fed. Supp. 218; U. S. ex rel. Ray vs. Martin, 141 Fed. 2d 218; People ex rel. Ray vs. Martin, 181 Misc. 985; People ex rel. Ray, 268 A. D. 218; People ex rel. Ray vs. Martin, 294 N. Y. 415.

[fol. 90] Copies of such opinions are annexed hereto.

Respectfully submitted, Donald A. J. Ray, by Thomas J. McKenna, Counsel.

[fol. 91] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The Appellant, Donald A. J. Ray, assigns the following errors in the record and proceedings had in this case:

The Court of Appeals, the court of final jurisdiction in the State of New York, erred:

1. In holding that petitioner could be tried and convicted and sentenced for a violation of Section 1044, Subdivision 2 and 1045-a of the Penal Law of the State of New York for the crime in question when committed by a non-Indian as against a non-Indian in the City of Salamanca, New York. The present City of Salamanca, being part of the Allegany Reservation, which, with several others, was set aside by the United States pursuant to Treaties for the Seneca Nation of Indians.

2. In holding that the New York State Court had jurisdiction of the offense in question (felony murder) despite the terms of a treaty entered into with the Iroquois Six Nations of Indians in 1794 (7 Stat. at Large 44).

3. In holding that the treaty did not exclude New York State jurisdiction over the offense committed in the City of Salamanca.

4. In holding that Section 8 of the Federal Act of 1875 (Ch. 90, 18 Stat. L. 330) conferred jurisdiction of the offense in question.

[fol. 92] 5. In holding that that Act (The Federal Act of 1875) was a proper legal basis for the enactment of Section 71 of the Indian Law of the State of New York.

6. In holding that the State Court had jurisdiction of this offense by virtue of the validity of Section 71 of the Indian Law of the State of New York.

7. In holding that Section 217 of Title 25, U. S. C., Annotated, did not confer jurisdiction upon the Federal Courts for the offense in question.

8. In holding that subdivision 3 of Section 451 of Title 18, U. S. C., and Section 452 of Title 18, U. S. C. did not confer the jurisdiction of the offense in question.

9. In holding that the last three mentioned sections, when read together, did not apply to the offense in question when committed on the lands in question.

Prayer for Reversal

Because of the foregoing errors, the appellant, Donald A. J. Ray, prays that the said judgment of the County Court of the County of Wyoming, New York, and the decision of the Court of Appeals of the State of New York upon which said judgment was entered, in the above-entitled cause, be reviewed by the Supreme Court of the United States and reversed and judgment rendered in favor of the Appellant, with costs in all courts.

Donald A. J. Ray, by Thomas J. McKenna.

[fol. 93] In the Supreme Court of the United States

[Title omitted]

Order Allowing Appeal

The appellant in the above entitled action having prayed for the allowance of an appeal herein to the Supreme Court of the United States from the judgment of the County Court of the State of New York entered in the office of the Clerk of the County of Wyoming, New York, on the 8th day of March, 1945, upon the remittitur and final decision of the Court of Appeals of the State of New York bearing date March 1, 1945, and having presented and filed his

petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction on appeal pursuant to the statutes of the United States and the rules of the Supreme Court of the United States, it is

Ordered, that an appeal be and the same hereby is allowed to the Supreme Court of the United States as provided by law, and it is further

Ordered, that the Clerk of the County Court of the County of Wyoming and State of New York, to which Court the record herein has been remitted, shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that the transcript shall reach said Court within forty days of the date of this order, and it is further

[fols. 94-99] Ordered, that security for costs herein be fixed in the sum of Five Hundred ($500.00) Dollars.

Dated, May 16, 1945.

Robert H. Jackson, Associate Justice of the United States Supreme Court.

I am allowing the appeal herein with the same doubts expressed by Chief Judge Lehman in order to bring the question before the full court.

R. H. J.

[fol. 100] In the Supreme Court of the United States

[Title omitted]

Statement of Points to Be Relied Upon—Filed July 5, 1945

Point I

Section 71 of the New York State Indian Law which undertook to extend into the locus in quo within an Indian Reservation the general laws of the State, which included among others Section 1044, Subdivision 2 of the Penal Law, the "felony murder" for which appellant was tried and Section 1045-A of the same law under which he was sentenced to life imprisonment, is repugnant to Article I, Section 8, Clause 3 of the United States Constitution and

Treaties and Federal Laws made under that constitutional provision and the New York State Court erred in holding that section of the Indian Law was a valid basis for state jurisdiction of the offense.

Point II

Treaties made under the Federal constitutional provision and Federal statutes enacted thereunder to cover the offense in question within the locus in quo rendered invalid Section 1044, Subdivision 2 of the State Penal Law and section 1045-A of the same State Law and the New York State Court erred in holding said State penal statutes valid and applicable to the place in question without the aid of the heretofore challenged Section 71 of the State Indian Law.

[fol. 101] Point III

Appellant's commitment and incarceration by virtue of an order of the Supreme Court of the State of New York in violation of what has been set forth under Points I and II of this brief is a violation of appellant's rights guaranteed by Amendment XIV, Section 1 of the Constitution of the United States and appellant is entitled to the remedy of habeas corpus.

Respectfully submitted, Thomas J. McKenna, Attorney for Appellant, Office & P. O. Address, 706 Morgan Bldg., Buffalo, New York.

[File endorsement omitted.]

[fol. 101-a] In the Supreme Court of the United States

[Title omitted]

Designation of Parts of Record To Be Printed—Filed July 11, 1945

I, Thomas J. McKenna, as attorney for appellant, think the following parts of the record necessary for the consideration of this Court:

Printed record on appeal to the Court of Appeals;

Opinion of the Court of Appeals, Desmond J. (This document is a part of the appellant's jurisdictional state-

ment and need not be included or certified separately therefrom);

Remittitur of the Court of Appeals;

Order of Judge Conable on remittitur;

Petition for appeal, assignment of errors and prayer for reversal;

Jurisdictional statement (If consistent with the Rules only the opinion of the Court of Appeals, as previously listed, should be in the transcript of record as printed under direction of the Clerk of the Supreme Court);

Order allowing appeal, signed by Mr. Justice Jackson on May 16, 1945;

Proofs of service (to be omitted in printing);

Statement directing attention to Rule XII, 3 and proof of service (to be omitted in printing);

Bond for costs on appeal (to be omitted in printing);

Respectfully submitted, Thomas J. McKenna, Attorney for Appellant, Office & P. O. Address, 706, Morgan Bldg., Buffalo, New York.

[fol. 101-b] [File endorsement omitted]

[fol. 102] SUPREME COURT OF THE UNITED STATES

[Title omitted]

Appeal from the County Court of Wyoming County, State of New York

ORDER DISMISSING APPEAL AND GRANTING CERTIORARI—October 8, 1945

The appeal in this case is dismissed for want of jurisdiction, sec. 237(a) of the Judicial Code as amended, 28 U. S. C., sec. 344(a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by sec. 237(c) of the Judicial Code as amended, 28 U. S. C., sec. 344(c), certiorari is granted. The Solicitor General of the United States is invited to file a brief amicus curiae if he is so advised.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this case.

[fol. 102-a] [Endorsed on Cover:] Enter Thomas J. McKenna. File No. 49,861. New York, County Court, Wyoming County, Term No. 158. The People of the State of New York, ex rel. Donald A. J. Ray, Appellant, vs. Walter B. Martin, as Warden of Attica State Prison, Attica, New York. Filed June 23, 1945. Term No. 158, O. T. 1945.